International Union of Operating Engineers, Local 150, AFL–CIO and Nickelson Industrial Service, Inc. *and* Laborers' International Union of North America, Local 4, AFL–CIO. Case 13–CD–709–1

August 31, 2004

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. The charge in this proceeding was filed February 10, 2004,[1] by Nickelson Industrial Service, Inc. (the Employer), alleging that the Respondent, International Union of Operating Engineers, Local 150, AFL–CIO (the Operating Engineers or Local 150), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Laborers' International Union of North America, Local 4, AFL–CIO (the Laborers or Local 4). The hearing was held on March 1 before Hearing Officer Denise Jackson-Riley.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is an Illinois corporation that provides services in excess of $50,000 to companies outside the State of Illinois. The parties stipulate, and we find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Operating Engineers and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer is engaged in the business of dismantling industrial machinery. In January 2004, the Employer was hired by Era Valdivia Contractors, Inc. (EVC), the general contractor responsible for work at the Field Museum annex project in Chicago, to perform interior demolition work at the site. Specifically, EVC hired the Employer to dismantle and remove beams and pipe that had been installed as a temporary measure to support the new annex building while concrete was poured into the structure. In order to remove the beams and pipe, the Employer had to cut them into small pieces and then move the pieces by forklift to an area where they could be lifted out of the structure by a crane. The Employer had a collective-bargaining agreement with the Laborers and had always used Laborers-represented employees to perform its forklift work.

Before the Employer could begin work on the project, its forklifts needed to be lowered into the structure by crane. The Employer hired Imperial Crane to move the forklifts. On February 2, Imperial Crane lowered the forklifts into the structure and, once the forklifts were in place, employees represented by Local 4 began performing the forklift work.

That same day, Local 150 business agents Dabney McCain and Kevin Burke went to the jobsite after learning that forklifts were being put in place. At the work site, McCain and Burke spoke with Tony Kavouris, senior project manager for EVC, and a foreman[2] for the Employer. McCain stated that the forklift work belonged to Local 150. Kavouris told McCain to get in touch with the Laborers' business agent and resolve the issue.

McCain called Local 4 business agent William Hosty and informed him that he would be sending three operating engineers from Local 150 to operate the forklifts at the Field Museum site. Hosty told him that he did not think that was a good idea and that he would send two Local 4 representatives out to discuss the matter with him. Shortly thereafter, Local 4 representatives James Leatherman and John Lally arrived at the site. The assembled union representatives discussed the matter but did not reach agreement.

In order to prevent any work disruption, the Employer arranged to have Industrial Crane provide three of its employees represented by Local 150 to operate the forklifts. Employees represented by Local 150 began performing the forklift work on February 3.

On or about February 10, Local 4 Business Agent Hosty called the Employer's president, Jeffrey Lev, to tell him that the forklift work belonged to the Laborers and that he needed to put employees represented by the Laborers on the work immediately. On February 10, four Local 4 laborers were dispatched to the worksite to replace the Local 150 operating engineers who had been operating the forklifts.

[1] All dates are in 2004, unless otherwise indicated.

[2] There is conflicting testimony regarding the name of this employee, but ultimately his true identity is not relevant to the determination of the issues presented.

That same day, Local 150 agent McCain called Lev and stated that the forklift work belonged to the Operating Engineers. Lev suggested that McCain call Local 4 agent Hosty and that the two parties should settle the matter. Local 150 agent Dan Regan also called Lev stating that the forklift work belonged to Local 150. As he had with McCain, Lev told Regan to call Hosty to "straighten it out," and stated that the Employer would abide by the unions' decision. Lev further testified that Regan "got a little upset with me and told me to use laborers for everything" because "he was going to pull his people off."[3]

The next day, February 11, the Operating Engineers picketed the Field Museum site and shut down work for 2 days.[4] On February 12, EVC reclaimed the forklift work from the Employer and, thereafter, employees represented by Local 150 performed the forklift work. EVC has indicated that it will return the work to the Employer if the Board awards the disputed work to the Laborers.

B. Work in Dispute

The work in dispute is the operation of forklift trucks for the purpose of interior demolition work, involving the dismantling and removal of support beams and pipe inside a building being constructed at the site of the Field Museum in Chicago, Illinois.[5]

C. Contentions of the Parties

The Employer contends that there is reasonable cause to believe that the Operating Engineers violated Section 8(b)(4)(D) by picketing the Field Museum site with the object of forcing the Employer to reassign the disputed work to employees represented by them. The Employer also contends that there is no voluntary method for resolving the dispute. Finally, the Employer asserts that the disputed work should be assigned to employees represented by Local 4 because the 10(k) factors weigh in favor of that assignment, including that the Employer is contractually bound to assign the work to Local 4.

The Laborers contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties do not have an agreed-upon method for resolving their dispute. Like the Employer, the Laborers assert that the 10(k) factors favor awarding the work to employees represented by Local 4.

The Operating Engineers contend that the Board should quash the notice of hearing because the Employer no longer controls the work in question, there is no reasonable cause to believe Section 8(b)(4)(D) has been violated, and the parties have an agreed-upon method to voluntarily adjust the dispute. In addition, the Operating Engineers contend that, should the Board undertake a Section 10(k) analysis, the relevant factors indicate that the work should be awarded to employees represented by Local 150.

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be established that there are competing claims for the work, that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated, and that the parties have no agreed-upon method for voluntary adjustment of the dispute.

To begin, Local 150 contends that because Local 150 and the Laborers are required to submit jurisdictional disputes to the Cook County Building Trades Joint Grievance Board, and because the Employer has a collective-bargaining agreement with Local 4, the parties are required to present any jurisdictional disputes to that tribunal. As we have recognized, however, in order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement. See *Laborers International Union (E & B Paving)*, 340 NLRB No. 150 (2003). Therefore, because the Employer is not a party to the Cook County Building Trades agreement, and its collective-bargaining agreement with the Laborers does not incorporate that agreement, we find that the Employer is not bound by the agreement and, therefore, that the agreement does not constitute an agreed-upon method for voluntary adjustment within the meaning of Section 10(k).

We also find that there are competing claims for the work in dispute. Local 4 has at all times claimed the work for the employees it represents, and these employees have been performing the work. Also, Local 150 representative Regan warned the Employer that it would pull all operating engineers off the site if the Employer did not agree to use employees represented by Local 150. This evidence establishes its rival claim for the work.

In addition, we find that reasonable cause exists to find that a violation of Section 8(b)(4)(D) has occurred. Even assuming, as Operating Engineers argues, that an object of the picketing was to protest the Employer's wage rates, the evidence reasonably establishes that at least another object of the picketing was to force the Employer to assign the disputed work to employees represented by

[3] Regan testified that he "never called Jeff Lev and threatened [him]."

[4] The record does not reveal the language used on the picket signs, other than that Nickelson was named.

[5] The Operating Engineers believe that the work in dispute should be characterized as "renovation" or "restoration" work instead of "demolition" work. This assertion is not supported by the record.

Local 150. In making this finding, we rely upon statements made by Local 150 representative Regan warning the Employer that he would pull all the Operating Engineers off the Field Museum site if the Employer did not agree to use employees represented by Local 150 to perform the disputed work.[6] Because "[o]ne proscribed object is sufficient to bring a union's conduct within the ambit of Section 8(b)(4)(D)," we find that the dispute is properly before the Board for determination under Section 10(k) of the Act. *Longshoremen ILA Local 3033 ("Coastal Cargo Co."),* 323 NLRB 570, 572 (1997) (quoting *Cement Masons Local 577 (Rocky Mountain Prestress),* 233 NLRB 923, 924 (1977)).

Local 150's remaining contention, that a 10(k) determination is not warranted because the Employer no longer controls the ability to assign the disputed work, is without merit. We have repeatedly held that 10(k) determinations are proper where the original employer has lost the work in question as a result of the jurisdictional dispute. See, e.g., *Electrical Workers Local 98 (Total Cabling Specialists),* 337 NLRB 1275 (2002); *Dock Builders, Local 1456 (Vibroflotation),* 199 NLRB 453 (1972).

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Radio & Television Broadcast Engineers, IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

None of the labor organizations involved herein has been certified by the Board nor is there evidence indicating that a Board certification covered the disputed work.

The Employer is party to a collective-bargaining agreement with the Laborers that covers all "interior wrecking" work such as the work in dispute here. It has no collective-bargaining agreement with the Operating Engineers. This factor favors an award of the disputed work to employees represented by Local 4.

2. Employer preference and past practice

The Employer's preference, as clearly indicated by the testimony of Employer President Lev, is that the work in dispute be performed by employees represented by Local 4. In the past, the Employer has assigned all forklift work for interior demolition purposes to Laborers-represented employees. This factor favors awarding the disputed work to employees represented by Local 4.

3. Area and industry practice

The weight of the evidence indicates that the industry practice in the Chicago area is to use Laborers to perform the disputed work. The evidence establishes that all employer-members of the Chicago Demolition Contractors Association use employees represented by the Laborers to operate forklifts in interior demolition work. This factor favors awarding the work to employees represented by Local 4.

4. Relative skills and experience

Employees represented by Local 4 and Local 150 all receive extensive training in forklift operation and both Locals required their forklift operators to have the appropriate certifications. This factor does not favor awarding the work in dispute to either group of employees.

5. Economy and efficiency of operations

The Employer's president testified that, in his experience, employees represented by the Laborers can perform the disputed work more efficiently because they perform a wide range of tasks associated with interior demolition work, including torch cutting and saw cutting, as compared with the Operating Engineers, who only operate the forklifts. Therefore, this factor favors awarding the disputed work to employees represented by Local 4.

6. The interunion agreement

The Operating Engineers contend that a 1991 memorandum of understanding between Local 150 and the Laborers District Council (the Interunion Agreement) favors assignment of the disputed work to employees represented by Local 150. The Interunion Agreement, however, does not cover the work at issue. On its face, the Interunion Agreement covers only "the use of brick forklifts by mason contractors and small skid steer loaders . . . by cement and concrete contractors." Because the work in dispute does not fall within either of these categories of work, the Interunion Agreement is not relevant to the instant 10(k) determination.

In any event, even if we were to adopt Local 150's interpretation of the Interunion Agreement as covering the work at issue, we would not give this factor significant weight in determining the assignment of the work at is-

[6] Although, in his testimony, Regan denied making the threat, "it is well settled that a conflict in testimony does not prevent the Board from proceeding under Section 10(k)," because we need only find that "reasonable cause" exists for finding an 8(b)(4)(D) violation. *Bricklayers Local 15 (Fusco Corp.),* 278 NLRB 967, 968 (1986).

sue, because the Employer is not a party to the Interunion Agreement. See *Local Union No. 379, Ironworkers (Owren Kirklin & Sons)*, 261 NLRB 843, 845 (1982); *District Council of Painters No. 8 (Quad C Corp.)*, 259 NLRB 905, 907 (1982).

CONCLUSION

After considering all the relevant factors, we conclude that employees represented by Local 4 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between the Employer and the Laborers, employer preference and past practice, area and industry practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by the Laborers' International Union of North America, Local 4, AFL–CIO, not to that union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following determination of dispute.

1. Employees of Nickelson Industrial Service, Inc., represented by Laborers' International Union of North America, Local 4, AFL–CIO are entitled to operate forklift trucks for the purpose of interior demolition work involving the dismantling and removal of support beams and pipe inside a building being constructed at the site of the Field Museum in Chicago, Illinois.

2. International Union of Operating Engineers, Local 150, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Nickelson Industrial Service, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, International Union of Operating Engineers, Local 150, AFL–CIO shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C. August 31, 2004

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

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Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD